IN THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY, MARYLAND

BOARD OF REGENTS OF THE UNIVERSITY SYSTEM OF MARYLAND and UNIVERSITY OF MARYLAND COLLEGE PARK,	)	
Plaintiffs,	)	
v.	)	**Case No. CAL-13-02189**
ATLANTIC COAST CONFERENCE,	)	
Defendant.	)	

DEFENDANT ATLANTIC COAST CONFERENCE'S STATEMENT OF GROUNDS AND AUTHORITIES IN SUPPORT OF ITS MOTION TO DISMISS OR, ALTERNATIVELY, TO STAY PLAINTIFFS' COMPLAINT

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INTRODUCTION

Through this lawsuit, plaintiffs, the Board of Regents of the University System of Maryland ("Board of Regents") and University of Maryland, College Park ("UMD") (collectively, "plaintiffs"), are attempting to circumvent an earlier-filed lawsuit between the parties concerning the same subject matter—namely, whether plaintiffs may avoid their contractual obligation to pay defendant, Atlantic Coast Conference ("ACC"), an amount due from any withdrawing member institution. This lawsuit violates the United States Constitution, is deficient on its merits, and is being pursued in the wrong forum. It therefore should be dismissed. Alternatively, should any claim remain, that claim should be stayed pending resolution of the earlier-filed lawsuit.

As an initial matter, plaintiffs' claim under the Maryland Antitrust Act represents an unconstitutional effort to apply the law of Maryland extraterritorially to burden interstate activities of the ACC. Collegiate sports leagues like the ACC are unique commercial actors whose very nature requires that their internal governance issues be regulated uniformly on a national basis if these leagues are to exist at all. Like other interstate activities of sports leagues that courts have routinely found to be immune from state antitrust scrutiny pursuant to the Commerce Clause of the United States Constitution, the ACC's interstate activities are also beyond the reach of the Maryland Antitrust Act. Therefore, plaintiffs' state antitrust claim should be dismissed.

In addition to being unconstitutional, plaintiffs' antitrust claim is deficient on its face because they have failed to plead, as is their burden, that the ACC unreasonably has restrained competition in any relevant product or geographic market or that the ACC has caused an injury to competition that is distinct from any harm that it has purportedly suffered in its individual capacity. And plaintiffs' tortious interference claim is deficient on its face because it fails in

several respects to satisfy the elements of that cause of action under either Maryland or North Carolina law.

This lawsuit also should be dismissed because North Carolina is a more appropriate and convenient forum for this dispute. In nothing more than a transparent litigation tactic, plaintiffs filed this second lawsuit hoping to involve the courts of this state in a dispute centered squarely in North Carolina. First, the dispute involves the internal governance of a North Carolina unincorporated association with a primary place of business in North Carolina. Further, all of the operative events took place in North Carolina, far more witnesses are located in North Carolina than any other state, and the dispute will be governed by North Carolina law. Since there is already a lawsuit pending in North Carolina involving the same parties, claims and issues, the claims remaining in the instant lawsuit should be dismissed, or alternatively stayed, in favor of the first-filed North Carolina action so that the North Carolina court can adjudicate a dispute that rightly belongs there.

FACTUAL AND PROCEDURAL BACKGROUND[1]

A. The Parties

The ACC is an athletic conference that is organized and exists as an unincorporated association under the laws of North Carolina with its principal place of business in Greensboro, North Carolina. *See* Compl., ¶ 9. The ACC conducts its operations pursuant to the Atlantic Coast Conference Constitution (the "ACC Constitution"). *See* Compl., ¶ 51 & Exh. 1. The Board of Regents is the governing body of the University System of Maryland, and controls the

[1] The ACC disputes many, if not most, of the operative facts alleged by plaintiffs, but reproduces those facts here as they are alleged in Maryland's Complaint to the extent that this Court must accept them as true for purposes of a motion to dismiss. *See, e.g., RRC Ne., LLC v. BAA Md., Inc.*, 413 Md. 638, 643, 994 A.2d 430, 434 (2010) (observing that a court "must assume the truth" of all "well-pleaded facts and allegations contained in the complaint" while considering a motion to dismiss).

affairs of its co-plaintiff, UMD. *See* Compl., ¶ 7. UMD has been a member of the ACC since the conference's inception in 1953. *See id.*, ¶ 1.

The ACC's current members are Boston College, Clemson University, Duke University, Florida State University, Georgia Institute of Technology ("Georgia Tech"), UMD, University of Miami, University of North Carolina, North Carolina State University, University of Virginia, Virginia Polytechnic Institute and State University ("Virginia Tech"), and Wake Forest University (collectively referred to herein as "Member Schools"). *See* Compl., ¶ 9. In addition, Syracuse University ("Syracuse"), the University of Pittsburgh ("Pittsburgh"), the University of Notre Dame ("Notre Dame"), and the University of Louisville ("Louisville") are all slated to join the ACC within the next two years. *See id.*, ¶ 10.

Plaintiffs contend that the ACC is a joint venture whose primary functions are to govern, regulate, and promote certain intercollegiate athletic competitions among its members through the sale of television broadcasting rights, sponsorships, and other promotional benefits. *See id.*, ¶ 9. More particularly, plaintiffs allege that the ACC provides its members with "certain joint services necessary for [their] success," including "logistical and operational matters, such as scheduling games or matches and hiring and assigning referees," "selling broadcasting rights for conference events," "hosting a conference tournament," and "engaging in other joint promotional activities that increase the public recognition of the conference's member institutions." *See id.*, ¶ 19.

B. UMD Withdraws from the ACC.

According to plaintiffs, UMD's President determined in November 2012 that UMD's "mission would be best served" by terminating its longtime affiliation with the ACC and joining the Big Ten Conference (the "Big Ten"). *See id.*, ¶ 40. Plaintiffs suggest that one reason for this decision is financial—specifically, they expect that the Big Ten will pay it "annual distributions .

. . well in excess of the revenue distributions made by the ACC to its members." *See id.*, ¶ 49. This increased revenue is important to plaintiffs because UMD's athletic programs "must generate their own operating revenues" and have been operating "at a deficit" in recent years. *See id.*, ¶ 48. In fact, "severe budget shortfalls forced Maryland to eliminate seven teams in 2012," including men's cross country, men's indoor track, men's swimming and diving, men's tennis, women's acrobatics and tumbling, women's swimming and diving, and women's water polo. *See id.*, ¶ 48. On November 19, 2012, the Board of Regents approved UMD's decision to join the Big Ten beginning on July 1, 2014, and UMD's president announced that decision to the public later the same day. *See id.*, ¶¶ 1, 40.

C. The ACC Files an Action in North Carolina to Enforce Plaintiffs' Withdrawal Payment Obligation.

Section IV-5 of the ACC Constitution governs the rights and obligations of the ACC and any member upon that member's withdrawal from the conference. *See* Compl., Exh. A, at § IV-5. On September 11, 2012—over two months prior to UMD's public announcement that it was withdrawing from the conference—the ACC approved an amendment to this section of the ACC Constitution through a vote of its Council of Presidents. *See* Compl., ¶ 53. As amended, Section IV-5 of the ACC Constitution now states that:

> Upon official notice of withdrawal, the [ACC] member will be subject to a withdrawal payment, as liquidated damages, in an amount equal to three times the total operating budget of the Conference . . . which is in effect as of the date of the official notice of withdrawal. The [ACC] may offset the amount of such payment against any distributions otherwise due such member for any Conference year. Any remaining amount due shall be paid by the withdrawing member within 30 days after the effective date of withdrawal. The withdrawing member shall have no claim on the assets, accounts or income of the [ACC].

Id., ¶ 53. Prior to this amendment, Section IV-5 required a withdrawal payment in an amount equal to "one and one-quarter (1 1/4) times the total operating budget of the Conference." *See id.*, Exh. A, at § IV-5 (version of ACC Constitution in effect prior to September 11, 2012).

Plaintiffs concede that, at present, the withdrawal payment required by Section IV-5 of the ACC Constitution equals approximately $52 million dollars. *See id.*, ¶ 54. On November 26, 2012, the ACC filed a lawsuit against UMD and the Board of Regents in the North Carolina Superior Court of Guilford County (the "North Carolina Lawsuit"), alleging that this payment obligation is fully binding upon plaintiffs. *See* Compl. ¶ 13; *see also* Complaint, *Atlantic Coast Conference v. University of Maryland, et. al.*, Civil Action No. 12CVS10736 (N.C. Super. Ct., Guilford County, Nov. 26, 2012), ¶ 1 (the "North Carolina Complaint").[2]

The ACC alleges further that an actual controversy exists between the ACC and plaintiffs as a result of the public statements of UMD's president that the withdrawal payment is illegal and his refusal to provide assurance that it will be paid as required by the ACC Constitution. *See* North Carolina Complaint, ¶¶ 31–35. On these grounds, the ACC seeks a declaration that: (i) Section IV-5 of the ACC Constitution is valid and enforceable against plaintiffs; and (ii) pursuant to Section IV-5, UMD is subject to a withdrawal payment in the amount of $52,266,342. *See id.* at Prayers 1–2.

The ACC, on or around December 2012, exercised its right under Section IV-5 to "offset" UMD's approximately $52 million withdrawal payment by withholding approximately a $3 million distribution that otherwise would have been payable to UMD. *See* Compl., ¶ 68.

[2] The North Carolina Complaint is referenced explicitly in Maryland's Complaint, *see* Compl., ¶ 13, and is generally available to any member of the public as a public filing maintained by the North Carolina Superior Court. In these circumstances, this Court can take judicial notice of the contents of the North Carolina Complaint for the limited purpose of considering the ACC's arguments in Sections III and IV, *infra*, that this action should be dismissed or stayed on the basis of inconvenient forum, comity, or judicial efficiency. *See Faya v. Almaraz*, 329 Md. 435, 444, 620 A.2d 327, 331 (1993) (holding that, on motion to dismiss, court may take judicial notice of "additional facts that are either matters of common knowledge or capable of certain verification" without converting motion into motion for summary judgment); *Cobrand v. Adventist Healthcare, Inc.*, 149 Md. App. 431, 434–35, 816 A.2d 117, 118–19 (2003) (considering matters outside pleadings regarding residences of likely witnesses in context of a motion to transfer venue based on inconvenient forum). If it pleases this Court, the ACC will supplement this filing with a copy of the North Carolina Complaint for this Court's convenience and reference.

Consistent with Section IV-5, the ACC also has informed UMD of its intention to withhold any future distributions until the withdrawal payment has been paid in full. *See id.*

D. Plaintiffs File A New Lawsuit Concerning the Same Subject Matter.

Nearly two months after the North Carolina Lawsuit was filed, plaintiffs initiated this action on January 18, 2013. As part of this lawsuit, plaintiffs seek relief that is substantially similar to the relief sought in the North Carolina Lawsuit. Specifically, plaintiffs acknowledge that an actual controversy exists between the parties with respect to Section IV-5 of the ACC Constitution, and seek a declaratory judgment regarding the enforceability of that section. *See* Compl., at Prayers b–d, p. 32. Plaintiffs also assert claims for breach of contract, violation of the Maryland Antitrust Act, and tortious interference with prospective advantage. *See generally* Compl., at Counts II–IV.

ARGUMENT

I. PLAINTIFFS' ANTITRUST CLAIM VIOLATES THE COMMERCE CLAUSE OF THE UNITED STATES CONSTITUTION.

In the Commerce Clause of the United States Constitution, Congress is granted the power "to regulate commerce . . . among the several States." *See* U.S. Const., Art. I, § 8 (the "Commerce Clause"). "Although the Commerce Clause is phrased as an affirmative grant of power to Congress, the Supreme Court has long recognized that 'the Commerce Clause even without implementing legislation by Congress is a limitation upon the power of the States . . . [that] limits state interference with interstate commerce.'" *Nat'l Collegiate Athletic Ass'n v. Miller*, 795 F. Supp. 1476, 1482 (D. Nev. 1992) (quoting *Freeman v. Hewit*, 329 U.S. 249, 252 (1946)). Specifically, the Commerce Clause operates to invalidate state statutes with indirect effects on interstate commerce where "the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Edgar v. Mite Corp.*, 457 U.S. 624, 640

(1982); *see also Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).[3] In this context, interstate commerce is burdened excessively where the challenged state statute attempts to govern "those phases of the national commerce which, because of the need for uniformity, demand their regulation, if any, be prescribed by a single authority." *S. Pac. Co. v. Arizona*, 325 U.S. 761, 767 (1945). As applied to the ACC, plaintiffs' antitrust claim presents such an unconstitutional burden on interstate commerce.

Simply put, sports leagues like the ACC are different from most commercial actors because their very nature requires that they be regulated on a national level if they are to exist at all. Courts have invoked the Commerce Clause repeatedly to prohibit state statutory interference with the internal governance of professional and amateur sports leagues. For instance, in the context of the NCAA's regulation of college football, the United States Supreme Court has observed:

> [T]he NCAA seeks to market a particular brand of football—college football. The identification of this "product" with an academic tradition differentiates college football from and makes it more popular than professional sports to which it might otherwise be comparable, such as, for example, minor league baseball. In order to preserve the character and quality of the "product," athletes must not be paid, must be required to attend class, and the like. And the integrity of the "product" cannot be preserved except by mutual agreement; if an institution adopted such restrictions unilaterally, its effectiveness as a competitor on the playing field might soon be destroyed. Thus, the NCAA plays a vital role in enabling college football to preserve its character, and as a result enables a product to be marketed which might otherwise be unavailable. In performing this role, its actions widen consumer choice—not only the choices available to sports fans but also those available to athletes—and hence can be viewed as procompetitive.

Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 101–02 (1984).

Likewise, in the context of professional football, the California Supreme Court has observed:

> Professional football is a nationwide business structured essentially the same as baseball. Professional football's teams are dependent upon the league playing

[3] Such operation of the Commerce Clause is commonly referred to as the "dormant Commerce Clause."

> schedule for competitive play, just as in baseball. The necessity of a nationwide league structure for the benefit of both teams and players for effective competition is evident as is the need for a nationally uniform set of rules governing the league structure. Fragmentation of the league structure on the basis of state lines would adversely affect the success of the competitive business enterprise, and differing state antitrust decisions if applied to the enterprise would likely compel all member teams to comply with the laws of the strictest state.

Partee v. San Diego Chargers Football Co., 668 P.2d 674, 678–79 (1983) (citing to *Flood v. Kuhn*, 407 U.S. 258, 267–68 (1972)). Other cases stand for substantially this same proposition.[4]

Because amateur and professional sports leagues are unique commercial actors, courts from around the United States conclude routinely that application of state statutes to their activities burden interstate commerce in violation of the Commerce Clause. For example, in *Partee* the California Supreme Court ruled that the Commerce Clause precluded the state of California from applying its antitrust statute to certain rules of the National Football League pertaining to its amateur draft, option clause, free agency, tampering rules, and collective bargaining agreement. *See* 668 P.2d at 676 & n.2. According to the *Partee* court, this particular application of the California antitrust statute violated the Commerce Clause because "[w]e are satisfied that national uniformity required in regulation of baseball and its reserve system is likewise required in the player-team-league relationships challenged by [plaintiff] and that the burden on interstate commerce outweighs the state interests in applying state antitrust laws to those relationships." *Id.* at 679.

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[4] *See, e.g.*, *Valley Bank of Nev. v. Plus Sys., Inc.*, 914 F.2d 1186, 1192 (9th Cir. 1990) ("Professional sports leagues have a limited number of teams, with no more than a few and rarely more than two teams in any state. The challenged state legislation in each case would have had significant impact on the whole league fabric, not just on the state's one or two teams."); *Miller*, 795 F. Supp. at 1484 ("The NCAA persuasively argues that its ability to accomplish goals of scholarship, sportsmanship, and amateurism depends to a substantial degree on the creation of nationally uniform rules under which teams can compete on an equal basis. In order to satisfactorily achieve these goals, the NCAA's enforcement procedures must be applied even-handedly and uniformly on a national basis."); *English v. Nat'l Collegiate Athletic Ass'n*, 439 So. 2d 1218, 1224 (La. Ct. App. 1983) ("[The NCAA's] essence is to deal with athletic relationships among players and colleges throughout the United States.").

Similarly, in *Miller* the United States District Court for the District of Nevada concluded that the state of Nevada could not constitutionally require the NCAA to comply with a Nevada state statute that would have imposed certain stringent due process requirements on the NCAA's ongoing investigation of rule violations at the University of Nevada, Las Vegas. *See* 795 F. Supp. at 1480–85. In particular, the *Miller* court found this application of the Nevada state statute to violate the Commerce Clause because:

> [T]he extraterritorial effect of the Nevada statute is substantial. It severely restricts the NCAA from establishing uniform rules to govern and enforce interstate collegiate practices associated with inter-collegiate athletics. The likely practical effect of the statute would be to compel the NCAA to adopt the procedural rules enacted by the Nevada Legislature, thereby allowing the Nevada Legislature to effectively dictate enforcement proceedings in states other than Nevada . . . . Here, as the record reflects, a strong possibility exists that other states will adopt legislation inconsistent with the Nevada statute, thus precluding the NCAA from having a uniform rule and procedural basis for conducting its investigation and review of member institutions.

Id. at 1485-86. For similar reasons, numerous other courts also have deemed state antitrust challenges to the activities of sports leagues to be unconstitutional under the Commerce Clause. *See Valley Bank of Nev.*, 914 F.2d at 1192 & n.12 (citing numerous cases for this proposition); *Partee*, 668 P.2d at 678 ("Following *Flood v. Kuhn*, state antitrust regulation has been held inapplicable to professional basketball . . . and professional football. No case has been found applying state antitrust laws to the interstate activities of professional sports.") (citing numerous cases for this proposition); *English*, 439 So. 2d at 1224 (rejecting Louisiana state antitrust challenge to NCAA activities); *see also* William L. Reynolds II & James D. Wright, *A Practitioner's Guide to the Maryland Antitrust Act*, 36 Md. L. Rev. 323, 340–41 (1976) ("Because most state antitrust acts, including Maryland's, assert jurisdiction over activities in interstate commerce, there are latent constitutional questions in every state antitrust case . . . . If those state attempts [to regulate professional baseball] had succeeded, professional baseball, and

indeed all professional sports, might have been blanketed by a veritable 'crazy quilt of state law.'"). The same result should obtain here with respect to plaintiffs' efforts to unconstitutionally superimpose the Maryland Antitrust Act onto the ACC's governance of its own affairs in interstate commerce.

There is no difference between the interstate activities of the ACC and those of other sports leagues—professional and amateur—whose internal governing rules are insulated from state antitrust scrutiny by the Commerce Clause by virtue of their distinctive nature. To start, the ACC shares a common structure with organizations such as the NCAA and NFL. *See Miller*, 795 F. Supp. at 1479 ("The NCAA is a voluntary, unincorporated association of colleges, universities, and affiliated conferences and organizations."); *Hebert v. L.A. Raiders, Ltd.*, 23 Cal. App. 4th 414, 418 (Cal. Ct. App. 1991) ("Defendant NFL is an unincorporated association comprised of 28 professional football teams . . . ."); Compl., ¶ 9 ("Defendant ACC is an unincorporated association . . . ."). Moreover, plaintiffs cannot dispute that the ACC "currently consists of 12 member institutions of higher education from seven States, including the State of Maryland," and with the imminent addition of Syracuse, Pittsburgh, Notre Dame, and Louisville, soon will consist of fifteen member institutions from ten states. *See* Compl., ¶ 10. Accordingly, the ACC's "essence" is like that of the NCAA, which is to "deal with athletic relationships among players and colleges" throughout a multitude of states. *See English*, 439 So. 2d at 1224. Moreover, the athletic teams competing within the ACC are dependent on the conference to establish a "schedule for competitive play" and "uniform set of rules governing the league structure." *Compare Partee*, 668 P.2d at 678–79, *with* Compl., ¶ 9 (alleging that ACC's functions include "logistical and operational matters, such as scheduling games or matches and hiring and assigning referees" and "hosting a conference tournament"). Accordingly, just like its

NCAA and NFL counterparts, the ACC is a unique commercial actor in the system of interstate commerce that demands uniform regulation at the national level.

There is absolutely no compelling reason for this Court to depart from these well-established principles to permit plaintiffs to extrapolate Maryland's antitrust laws onto the ACC's multi-state operations. Application of Maryland's Antitrust Statute to the question of whether UMD is obligated to make a withdrawal payment would unduly burden the ACC's activities in each of the other six (and soon to be nine) states where it operates. As in *Partee*, such a result would cause the ACC's business structure to "fragment" along state lines and permit each member institution to play by a different set of rules. *See* 668 P.2d at 678–79. Accordingly, application of the Maryland Antitrust Act in these circumstances would unduly burden interstate commerce because the ACC is a unique commercial actor whose need for uniformity across state lines means that its own internal governance of the teams in the conference be subject only to federal law.[5] As such, Count III of plaintiffs' Complaint should be dismissed because it violates the Commerce Clause as applied to the ACC.[6]

II. COUNTS III AND IV OF PLAINTIFFS' COMPLAINT SHOULD BE DISMISSED FOR FAILURE TO STATE A CLAIM.

A. Standard of Review

A complaint fails to state a claim when, even if the plaintiff's allegations are true, they "do not state a cause of action for which relief may be granted." *See RRC Ne., LLC v. BAA Md., Inc.*, 413 Md. 638, 643, 994 A.2d 430, 434 (2010); *accord Shailendra Kumar, P.A. v. Dhanda*,

[5] Dismissal of plaintiffs' antitrust claim will not leave them without an antitrust remedy. If plaintiffs are truly intent on asserting an antitrust claim against the ACC, there is nothing to preclude them from doing so under the federal Sherman Act in an appropriate United States District Court.

[6] In making this argument, the ACC does not suggest that the Maryland Antitrust Act is pre-empted by federal antitrust law, because the law is settled that state and federal antitrust statutes are co-extensive. *See, e.g., In re Microsoft Corp. Antitrust Litig.*, 332 F. Supp. 2d 890, 893 (D. Md. 2004). Rather, the ACC is proceeding solely on the separate and distinct argument that Count III of plaintiffs' Complaint violates the Commerce Clause as it is being applied to the ACC. *See, e.g., Partee*, 668 P.2d at 677 (distinguishing between pre-emption and Commerce Clause arguments).

426 Md. 185, 193, 43 A.3d 1029, 1033 (2012). In evaluating the sufficiency of a claim, this Court requires allegations to be pled "with sufficient specificity," and holds that "bald assertions and conclusory statements by the pleader will not suffice." *See, e.g.*, *RRC Ne., LLC*, 413 Md. at 644, 994 A.2d at 434; *see also Barman v. Karvounis*, 308 Md. 259, 265, 518 A.2d 726 (1987) ("[W]hat we consider are allegations of fact and inferences deducible therefrom, not merely conclusory charges."). In addition, "any ambiguity or uncertainty in the allegations bearing on whether the complaint states a cause of action must be construed against the pleader." *Faya v. Almaraz*, 329 Md. 435, 444, 620 A.2d 327, 331 (1993). Here, plaintiffs' claims for antitrust violations and tortious interference fail to state viable claims and should be dismissed with prejudice on their merits.

B. Plaintiffs Fail to State a Claim Under the Maryland Antitrust Act (Count III).

Plaintiffs' antitrust count fails to state a claim upon which relief can be granted. This claim is premised upon Md. Code Ann., Com. Law § 11-204(a), which prohibits any person from "unreasonably restrain[ing] trade or commerce." According to plaintiffs, the ACC's implementation of the withdrawal payment required by Section IV-5 of the ACC Constitution "constitutes an agreement, combination or conspiracy among the ACC and the members voting in favor of the draconian fee that unreasonably restrains trade." *See* Compl., ¶ 106. Plaintiffs contend further that this restraint occurs by virtue of the withdrawal payment "chilling . . . the ability of intercollegiate athletic conferences to build teams and promote their member institutions," "prevent[ing] schools from leaving the Conference," and "weakening Maryland as a competitor" by "eliminating a significant portion of the revenues that Maryland uses for its athletic teams." *See* Compl., ¶ 107. Plaintiffs' antitrust claim is deficient on its face because it

fails to define the relevant product and geographic markets allegedly harmed by the ACC and does not allege any antitrust injury.

1. Plaintiffs' Antitrust Claim Fails to Define a Relevant Market.

Contrary to plaintiffs' assertions, their antitrust claim is not entitled to either a "per se" or "quick look" antitrust review. *See* Compl., ¶ 108. Rather, the law is clear that athletic associations, conferences, and other athletic "joint ventures" like the ACC are entitled to have their conduct evaluated under the "rule of reason" antitrust standard. *See, e.g.*, *Bd. of Regents*, 468 U.S. at 100–03 (applying rule of reason to NCAA television broadcast restrictions because the unique characteristics of intercollegiate athletics make it "an industry in which horizontal restraints on competition are essential if the product is going to be available at all"); *Nat'l Hockey League Players' Ass'n v. Plymouth Whalers Hockey Club*, 325 F.3d 712, 719 (6th Cir. 2003) ("It is now well established through the myriad of case law that rules and regulations normally employed by professional sports leagues and other organizations are not subject to the *per se* rule, but rather will be analyzed under the rule of reason.") (internal citations omitted).[7] The rule of reason standard of review requires plaintiffs to allege with specificity the relevant markets that they claim are harmed by the ACC's actions. Plaintiffs have failed to do so here.

For purposes of an antitrust claim, a properly defined market has two components—the relevant product market and the relevant geographic market. *See Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 459 (1993); *E.I. du Pont de Nemours & Co. v. Kolon Indus., Inc.*, 637 F.3d 435, 441 (4th Cir. 2011). Defining the relevant product market is the necessary first step in defining the relevant market; the relevant geographic market must follow. *See Ad-Vantage Tel.*

[7] Because of the similarity between federal antitrust law and the Maryland Antitrust Act, "federal court interpretations of similar federal laws should guide the interpretation of the Maryland antitrust laws . . . [and] state claims under section 11-204(a) and (b) must fail where those same claims would also fail under similar federal law." *See S. Volkswagen, Inc. v. Centrix Fin., LLC*, 357 F. Supp. 2d 837, 846 (D. Md. 2005).

Directory Consultants, Inc. v. GTE Directories Corp., 849 F.2d 1336, 1342 (11th Cir. 1987) ("Determining the product market is only the first step. The relevant product market must also be accompanied by proof of the relevant geographic market."); *Caldera, Inc. v. Microsoft Corp.*, 87 F. Supp. 2d 1244, 1251 (D. Utah 1999) ("[D]etermining whether competition has been foreclosed in a given market requires first, defining the product market, and second, identifying the geographic market."). The failure to define either a relevant product or geographic market is a fatal pleading flaw that warrants dismissal of an antitrust claim because without knowing the relevant market, "there is no way for a court to determine whether a defendant has restrained trade . . . or to measure a defendant's ability to lessen or destroy competition." *Adidas America, Inc. v. Nat'l Collegiate Athletic Ass'n*, 64 F. Supp. 2d 1097, 1101 (D. Kan. 1999) (internal citations omitted); *see also Worldwide Basketball & Sport Tours, Inc. v. Nat'l Collegiate Athletic Ass'n*, 388 F.3d 955, 962 (6th Cir. 2005) ("Failure to identify a relevant market is a proper ground for dismissing [an antitrust] claim." (internal citations omitted)). Here, plaintiffs have failed to allege either a relevant product or geographic market with the precision required to sustain its antitrust claim.

Product Market. A relevant product market includes those products that are reasonable substitutes for each other. *See United States v. Grinnell Corp.*, 384 U.S. 563, 571 (1966); *United States v. E. I. du Pont De Nemours & Co.*, 351 U.S. 377, 391 (1956). In this case, plaintiffs do not specify a particular relevant product market, but instead allege vaguely that the ACC's conduct affects the following disparate product markets:

> [T]he ACC's actions adversely affect competition in the markets in which conferences compete for university members and in which universities compete for membership in conferences. In addition, the ACC's conduct also adversely affects relevant markets for providing educational services and athletic competitions for student-athletes and for providing athletic events for consumers

> of intercollegiate sporting events. Further, the ACC's conduct reduces competition in the relevant market for coaches of intercollegiate sports.

Compl., ¶ 104. But plaintiffs fail to define the contours of each of these markets so as to describe what they include. Nor do they explain exactly how each of these product markets is restrained by the ACC's conduct, how the ACC has market power within each of these product markets so as to render the ACC's withdrawal payment an allegedly unreasonable restraint on competition, or why there are no reasonable substitutes for the products that the ACC provides in each of the markets that it identifies. *See Tanaka v. Univ. of S. Cal.*, 252 F.3d 1059, 1063 (9th Cir. 2001) (holding that plaintiff's bare allegation that UCLA women's soccer as the relevant products market insufficient given the vast number of Division 1 women's soccer programs available). For example, it is unclear from the Complaint whether plaintiffs intend to assert that there is no reasonable substitute for ACC intercollegiate sports, or whether they believe that the ACC schools have market power in the market for all "educational services and athletic competitions for student-athletes." Absent these details, the bald assertions and conclusory statements by plaintiffs with respect to the relevant product markets cannot sustain an antitrust claim because they fail to provide any meaningful definition of a relevant product market that would permit an assessment of whether the ACC's actions amount to an antitrust violation. *See Agnew v. Nat'l Collegiate Athletic Ass'n*, 683 F.3d 328, 346–48 (7th Cir. 2012) (upholding dismissal of student-athlete's antitrust challenge to NCAA limits on the number of scholarships per school based on a failure to adequately allege an appropriate relevant product market).

Geographic Market. An antitrust plaintiff also is required to specify the "geographic" attributes of the relevant market by defining "the area in which a potential buyer may rationally look for the goods or services he or she seeks." *See Pocono Invitational Sports Camp, Inc. v. Nat'l Collegiate Athletic Ass'n*, 317 F. Supp. 2d 569, 586 (E.D. Pa. 2004) (internal citations

omitted); *see also Agnew,* 683 F.3d at 335 ("Under a Rule of Reason analysis, the plaintiff carries the burden of showing that an agreement or contract has an anticompetitive effect on a given market within a given geographic area."); *Tanaka*, 252 F.3d at 1063 ("We have explained that the term 'relevant market' encompasses notions of geography as well as product use, quality, and description. The geographic market extends to the 'area of effective competition' where buyers can turn for alternative sources of supply.").

In their Complaint, plaintiffs acknowledge the importance of geography by alleging that "[f]rom the perspective of a prospective Division I conference member such as Maryland, geographic and competitive considerations limit the number of conferences that fall within the relevant market." *See* Compl., ¶ 105 (emphasis supplied). But after noting the pivotal role played by geography, plaintiffs then fail to allege how geography circumscribes the markets they identify. Indeed, none of the "markets" listed in paragraph 104 of its Complaint contain any reference to geography. As with its failure to define a product market, plaintiffs' disregard of the geographic components of these markets is a fatal pleading flaw that warrants dismissal of the antitrust claim.

The circumstances here are similar to those present in *Tanaka v. University of Southern California*, where the Ninth Circuit affirmed the dismissal of an antitrust claim at the motion to dismiss stage based on the plaintiff's failure to allege an appropriate geographic market. The *Tanaka* plaintiff challenged a "transfer rule" imposed by the then-Pacific-10 Conference that required her to sit out a year of athletic competition and lose a year of athletic eligibility after her intra-conference transfer from the University of Southern California to the University of California at Los Angeles. *See* 252 F.3d at 1061. In affirming dismissal of this claim, the Ninth Circuit observed that the plaintiff's allegation that the "relevant geographic market is Los

Angeles" was flawed because it was not the "area of effective competition for student-athletes competing for positions in women's intercollegiate soccer programs." *See id.* at 1063. Rather, "Tanaka's own experience strongly suggests that the relevant geographic market is national in scope." *Id.*

Similarly, in *JES Properties, Inc. v. USA Equestrian, Inc.*, the plaintiffs brought an antitrust claim contending that the defendant had restrained their ability to operate horse shows, and identified their relevant geographic market as a 250-mile radius extending from the locations of existing horse shows and/or the locations where they sought to host shows. *See* 253 F. Supp. 2d 1273, 1281 (M.D. Fla. 2003). The United States District Court for the Middle District of Florida rejected that definition of the geographic market, reasoning that the plaintiffs had failed "to delineate why the geographic market should be limited solely to the State of Florida and not to the South/Southeast or even the United States as a whole." *Id.*

Here, plaintiffs have done even less to define their putative markets than the plaintiffs in *Tanaka* and *JES Properties, Inc.* because, unlike the plaintiffs in those cases, plaintiffs' Complaint here does not attempt to define any geographic market at all. Instead, plaintiffs allege vaguely that the ACC's actions have harmed competition in the markets for "membership in conferences," "educational services and athletic competitions," and "coaches of intercollegiate sports." *See* Compl., ¶ 104. But these vague and conclusory allegations are insufficient under both Maryland pleading standards and antitrust law to state a claim because they leave the ACC and this Court with no way to evaluate whether the ACC has market power to affect competition in the geographic area that those amorphous markets could implicate. *See, e.g.*, *Adidas America, Inc.*, 64 F. Supp. 2d at 1101; *RRC Ne., LLC*, 413 Md. at 644, 994 A.2d at 434. For example, although plaintiffs themselves acknowledge that geographic considerations limit a school's

conference options, *see* Compl., ¶ 105, their Complaint is completely silent as to whether those considerations could limit UMD's options for "membership in conferences" to conferences that already are located within the ACC's geographic footprint, to conferences with members located entirely east of the Missisippi River, or to conferences with an existing member located in a state sharing a border with Maryland. The complete failure of plaintiffs to define a geographic market warrants dismissal of their antitrust claim.

2. Plaintiffs' Antitrust Claim Fails to Allege Antitrust Injury.

Furthermore, plaintiffs' antitrust claim must be dismissed because it fails to allege any antitrust injury to competition. Antitrust injury is "the type [of injury] the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Brunswick Corp. v. Pueblo Bowl–O–Mat, Inc.*, 429 U.S. 477, 489 (1977). "[I]t is the impact on competitive conditions in a definable market which distinguishes the antitrust violation from the ordinary business tort. The failure to allege injury to competition is a proper ground for dismissal by judgment on the pleadings." *Tanaka*, 252 F.3d at 1064. In other words, "[t]he antitrust laws were enacted to protect *competition,* not *competitors* . . . . Thus, simply pleading an economic injury to oneself or conclusory allegations is insufficient." *See Eastside Vend Distribs., Inc. v. Coca-Cola Enters., Inc.*, No. 24-C-04-003998, 2006 WL 1516012, at *18 (Md. Cir. Ct. May 8, 2006). Here, plaintiffs' antitrust claim does nothing more than allege an injury to UMD that has no bearing on any harm to competition in any relevant market.

Plaintiffs do not allege—nor could they—that the withdrawal payment required by Section IV-5 of the ACC Constitution has prevented any current or prospective member of the ACC from taking any actions that the school considers to be in its best competitive interests. In fact, just the opposite is true. UMD itself intends to go through with its move from the ACC to the Big 10 as of July 1, 2014, and the ACC has not suggested in this lawsuit or elsewhere that

UMD should be prohibited from making that move. *See* Compl., ¶¶ 1, 40. In addition, notwithstanding the existence of the withdrawal payment requirement, Syracuse, Pittsburgh, Notre Dame, and Louisville have all decided to join the ACC within the next two years. *See id.*, ¶¶ 10, 30. Put differently, plaintiffs' true complaint is not that the withdrawal payment has prevented UMD from leaving the ACC or discouraged others from joining the ACC; it is simply that UMD does not want to pay the withdrawal payment of approximately $52 million per the ACC Constitution. This is an important distinction, because it reveals that plaintiffs have done no more in their Complaint than allege a purported injury to UMD, not to overall competition.

In analogous circumstances, restrictions placed on the award of new professional team franchises or on the relocation of existing franchises by sports leagues have been held repeatedly not to constitute antitrust injury. *See, e.g.*, *Mid–South Grizzlies v. Nat'l Football League*, 720 F.2d 772, 785–86 (3d Cir. 1983) (holding that denial of application for membership in NFL not an antitrust injury); *Seattle Totems Hockey Club, Inc. v. Nat'l Hockey League*, 783 F.2d 1347, 1350 (9th Cir. 1986) (finding that failed application for NHL expansion franchise not an antitrust injury); *Fishman v. Estate of Wirtz*, 807 F.2d 520, 531 (7th Cir. 1986) (holding that NBA refusal to sanction transfer ownership of Chicago Bulls not an antitrust injury absent some separate injury to competition); *Levin v. Nat'l Basketball Ass'n*, 385 F. Supp. 149, 152 (S.D.N.Y. 1974) (finding that NBA denial of application of prospective purchaser for Boston Celtics not an antitrust injury). In other words, courts have held consistently that the particularized harm suffered by these prospective team owners is not an injury to competition for antitrust purposes. The same is true of the requirement that UMD pay a withdrawal payment as liquidated damages to compensate the ACC for the reasonably foreseeable consequences of its departure. Harm

caused to one member of a sports league by operation of that league's internal governing rules simply does not constitute antitrust injury.

Indeed, there is nothing anti-competitive about the withdrawal payment required by Section IV-5. It is merely a method of internal governance used by the ACC. Plaintiffs' failure to allege an anti-competitive injury, as distinct from the injury that it believes UMD alone will suffer if required to pay the withdrawal payment, requires dismissal of the antitrust claim. *See Plymouth Whalers*, 325 F.3d at 720 (finding failure to establish antitrust injury where challenged regulation might "result in significant personal injury" to plaintiff, but there was no "evidence of an injury to a definable market"); *Tanaka*, 252 F.3d at 1064 (affirming dismissal of antitrust claim based on lack of injury where plaintiff "alleges nothing more than a personal injury to herself, not an injury to a definable market").[8]

C. Plaintiffs Fail to State a Claim for Tortious Interference With Prospective Advantage (Count IV).

In Count IV of the Complaint, plaintiffs contend that: (i) the ACC's adoption of the withdrawal payment, (ii) the withholding of UMD's distribution of conference revenues, and (iii) an alleged denial of equal treatment as an ACC member constitute tortious interference with plaintiffs' prospective advantage. *See* Compl., ¶¶ 114-15. These allegations fail to state a claim upon which relief can be granted.

Maryland courts have not definitively settled the question of which state's law applies in tortious interference with business relations cases when the alleged wrongdoing occurred in one

[8] Nor can plaintiffs convert an injury to UMD into an injury to competition by the conclusory allegation that the withdrawal payment would "weaken[] Maryland as a competitor" or "wipe out nearly the entire intercollegiate athletic budget of Maryland." *See* Compl., ¶¶ 107, 109. In addition to being yet another example of only a purported injury to UMD that has no bearing on overall competition in any relevant market, it is also clear from plaintiffs' own allegations that UMD's economic woes are self-inflicted. Long before Section IV-5 of the ACC Constitution was amended and long before UMD announced its intention to leave the ACC in the fall of 2012, plaintiffs concede in their Complaint that UMD's athletic department already had been operating "at a deficit," and "severe budget shortfalls" had required it to eliminate seven athletic teams. *See* Compl., ¶ 48. Accordingly, if UMD has been weakened as an athletic competitor, it is not due to any action on the part of the ACC.

state and the plaintiff resides in a different state.[9] Here, however, the result is the same under both North Carolina or Maryland law—plaintiffs' tortious interference claim is defeated both by what they do and do not allege in their Complaint.

1. Tortious Interference Under North Carolina Law

To state a claim for tortious interference with a prospective economic advantage under North Carolina law, a plaintiff must allege that: (i) a specific potential contract between the plaintiff and a third party exists; (ii) the defendant intentionally induced the third party not to enter into the contract; (iii) the defendant acted without justification; (iv) but for the defendant's action the plaintiff and third party would have entered into the contract; and (v) the defendant's action caused actual damage to the plaintiff. *See Dalton v. Camp*, 548 S.E.2d 704, 709–10 (N.C. 2001); *Walker v. Sloan*, 529 S.E.2d 236, 241–42 (N.C. Ct. App. 2000); *Spartan Equip. Co. v. Air Placement Equip. Co.*, 140 S.E.2d 3, 11 (N.C. 1965).

The Complaint fails to allege virtually all of these essential elements. Nowhere in the Complaint do plaintiffs identify a specific potential contract between themselves and any third party, other than their potential contract with the Big Ten. They do not allege that the ACC has intentionally induced any party not to enter into any contract or economic relationship with them;

[9] Maryland follows the *lex loci delicti* principle, which means that the "place of the wrong" is the state whose law applies, regardless of where the case is pending. S*ee, e.g.*, *B-Line Med., LLC v. Interactive Digital Solutions, Inc.*, 209 Md. App. 22, 49, 57 A.3d 1041, 1057 (2012). Further, "[Maryland] appl[ies] the law of the State where the injury—the last event required to constitute the tort—occurred." *Lab. Corp. of Am. v. Hood*, 395 Md. 608, 615, 911 A.2d 841 (2006) (citing cases). Here, however, plaintiffs have not specified where their alleged injury occurred, nor do they identify a single contract or relationship with which the ACC purportedly has interfered. And the fact that UMD is located in Maryland is not outcome-determinative because, if it were, all choice of law analyses would devolve into simply identifying where a defendant is located. *See ThunderWave, Inc. v. Carnival Corp.*, 954 F. Supp. 1562, 1565 (S.D. Fla. 1997) (applying Maryland rule and finding that "[s]ince in a tort action a corporation always suffers abstract financial injury at its primary place of business, the applicable law is not necessarily the corporation's primary place of business, but is rather where the injury was actually inflicted" (internal citations omitted)). On balance, because plaintiffs rely solely upon allegations of wrongdoing that took place in North Carolina—*i.e.*, adoption of the withdrawal payment provision, withholding of distributions, and treatment of UMD as an unequal member of the conference, *see* Compl. ¶¶ 114–15—the ACC contends that this Court should apply the law of North Carolina to plaintiffs' tort claim because it is the state where "all the conduct relating to the tort occurred." *B-Line Med., LLC*, 209 Md. App.at 49, 57 A.3d at 1057. However, as described above, it is not necessary for this Court to make that choice of law determination at this juncture because plaintiffs' tort claim is deficient under the law of either state.

indeed, their allegations with respect to the Big Ten indicate that there has been no interference with that contract. Similarly, they have not alleged the fourth essential element, which is that they would have entered into a contract with some third-party but for the actions of the ACC. Further, while plaintiffs assert in conclusory fashion that the ACC acted without justification and that the ACC has caused them actual damages, those allegations amount to nothing more than a repetition of their breach of contract claim. As is the case under Maryland law, *see* discussion, *infra*, in order to withstand a motion to dismiss a claim for tortious interference with prospective advantage, a plaintiff's claims must be "identifiable" and "distinct from" the primary breach of contract claim. *Akzo Nobel Coatings Inc. v. Rogers*, 11 CVS 3013, 2011 WL 5316772, at *20–21 (N.C. Super. Nov. 3, 2011). Thus, plaintiffs' claim for tortious interference is wholly deficient under North Carolina law.

2. Tortious Interference Under Maryland Law

The same result holds under Maryland law. The elements of a cause of action for tortious interference with prospective advantage under Maryland law are:

> (1) intentional and willful acts; (2) calculated to cause damage to plaintiff in its lawful business; (3) done with the unlawful purpose to cause such damage and loss, without right or justifiable cause on the part of the defendants (which constitutes malice); and (4) actual damage and loss resulting.

Natural Design, Inc. v. Rouse Co., 302 Md. 47, 71, 485 A.2d 663, 675 (1984) (quoting *Willner v. Silverman*, 109 Md. 341, 355, 71 A. 962, 964 (1909)) (internal quotation marks omitted).

As a threshold matter, plaintiffs admit facts in their Complaint that prevent them from contending that the adoption of the amendment to the ACC's Constitution was an act of tortious interference with any economic advantage held by UMD. As the elements of the claim set forth in *Natural Design* indicate, plaintiffs would need to show that when the CEOs of the ACC member institutions adopted the withdrawal payment obligation, imposing it upon their own

institutions, they were engaging in an intentional act calculated to cause damage to UMD, with the unlawful purpose to cause UMD that damage without any justifiable cause. Such an allegation would be absurd, of course, because the Complaint shows that plaintiffs did not even reveal UMD's intention to withdraw from the ACC until months after the withdrawal payment was adopted. The ACC could not have been directing its conduct specifically at UMD when, as the Complaint demonstrates, it had no reason to believe that UMD was planning to depart for the Big Ten. To be clear, the Complaint alleges that ACC members voted to amend the Constitution and revise the withdrawal payment in September of 2012. *See* Compl., ¶¶ 3, 53, 98. UMD did not announce its intent to depart the ACC until two months later, on November 19, 2012. *Id.* at ¶¶ 1, 40. Absent any knowledge of UMD's intention to depart the ACC, it is impossible for the ACC member institutions to have adopted the increased withdrawal penalty with a willful intent to harm UMD. Thus, the adoption of the withdrawal payment fails the initial element necessary for a claim for tortious interference with prospective economic advantage, which requires not some generalized intentional conduct that happened to harm a party's economic advantages, but a calculated attempt to cause harm specifically to the plaintiff.

Plaintiffs also attempt to satisfy their pleading obligation by relying on allegations that are nothing more than alleged breaches of contract—first, that the ACC has withheld from UMD distributions of ACC revenue and, second, that the ACC has denied UMD equal access and treatment as a member of the ACC. *See* Compl. ¶ 114. Under settled Maryland law, the alleged failure to perform a contractual obligation does not create a cause of action for tortious interference between the contracting parties. *K & K Mgmt., Inc. v. Lee*, 316 Md. 137, 154–55, 557 A.2d 965, 973 (1989) (holding that a tort action for interference with business "arises only out of the relationships between three parties, the parties to a contract or other economic

relationship . . . and the interferer"). The Maryland Court of Appeals "has refused to adopt any theory of tortious interference with contract or with economic relations that 'converts a breach of contract into an intentional tort.'" *Alexander & Alexander Inc. v. B. Dixon Evander & Assocs., Inc.*, 336 Md. 635, 654, 650 A.2d 260, 269–70 (1994) (internal citation omitted). Therefore, plaintiffs must allege that some relationship with a third party was interfered with, and that the interference with that relationship was the "object or purpose of the breach." *K & K Mgmt.*, 316 Md. at 162–63, 556 A.2d at 977. Not only must they allege that the interference was the purpose of the breach, but they must also identify with specificity which existing relationship is being interfered with or identify "a possible future relationship which is likely to occur, absent the interference"—neither of which they have done. *Baron Fin. Corp. v. Natanzon*, 471 F. Supp. 2d 535, 546 (D. Md. 2006) (citing and discussing Maryland authority).

Plaintiffs' Complaint has not identified any such current or prospective relationship; instead, plaintiffs allege only that the ACC's actions have hindered UMD's "ability to conduct its athletic affairs on level financial and competitive playing fields." *See* Compl., ¶ 115. A tortious interference cause of action does not exist when no particular business relationships are identified. *See Baron Fin. Corp.*, 471 F. Supp. 2d at 542–46 (dismissing claim where complaint failed to identify prospective relationships that were disrupted). The only prospective relationship alleged in the Complaint is UMD's relationship with the Big Ten, which, of course, the Complaint concedes will move forward despite the withdrawal payment obligation or any alleged breach by the ACC. In fact, the Complaint contains, at a minimum, eleven paragraphs touting the financial, athletic, and academic benefits that will accrue to UMD from its prospective relationship with the Big Ten, *see* Compl. ¶¶ 39–49, without any allegation that the

ACC has infringed in any way upon that relationship through its alleged withholding of funds or "unequal treatment" of UMD (or otherwise).

Plaintiffs' Complaint also does not allege, as it must, that the ACC's motive was to acquire for the ACC the economic benefit of UMD's unspecified current or prospective relationships, or that the ACC used unlawful means to harm UMD. *See K & K Mgmt.*, 316 Md. at 162–68, 557 A.2d at 977–81 (finding no tortious interference where the defendants did not claim that the plaintiff terminated a lease to appropriate the defendants' customers, and there was no evidence of unlawful means because plaintiff's action "was unlawful exclusively in the sense that it was a breach of contract"); *Volcjak v. Walsh Cnty. Hosp. Ass'n*, 124 Md. App. 481, 513–14, 723 A.2d 463, 479–80 (1999) (holding no tortious interference where there was no wrongful conduct alleged other than a breach of contract and no allegation that the defendant breached the contract to obtain the benefit of customer relationships). While plaintiffs can contend that certain acts of the ACC constitute a breach of contract, which the ACC does not concede, they cannot rely on those same acts to satisfy the "improper means" element of a tortious interference claims. Mere recitation in the Complaint of conclusory phrases like "improper purpose" and "without justifiable cause" cannot convert a simple breach of contract allegation into a tortious interference claim. Incidental effects on UMD's business relations with third parties, allegedly resulting from an alleged breach of contract by the ACC, do not establish the unlawful means necessary for a tortious interference claim. *See K & K Mgmt.*, 316 A.2d at 162–63, 166–68, 557 A.2d at 977–81.

In sum, none of the alleged acts of the ACC that plaintiffs contend supports their claim for tortious interference with prospective advantage—the adoption of the revised withdrawal payment, the withholding of revenue, and the alleged "unequal treatment"—can satisfy the

elements necessary to plead such a claim under either North Carolina or Maryland law. Accordingly, plaintiffs have failed to plead a claim for tortious interference with prospective advantage, and Count IV of the Complaint should be dismissed.

III. THE INSTANT LAWSUIT SHOULD BE DISMISSED IN FAVOR OF THE NORTH CAROLINA LAWSUIT.

For a variety of reasons, the claims that plaintiffs advance in this lawsuit are best adjudicated in North Carolina. The ACC is an unincorporated North Carolina association based in Greensboro, North Carolina. The amendment of Section IV-5 of its Constitution was debated, discussed, analyzed, and voted upon in Chapel Hill, North Carolina during the September 11-12, 2012 meeting of the ACC's Council of Presidents. Four of the Member Schools who voted on the amendment to Section IV-5 are located in North Carolina,[10] while five are closer to Greensboro, North Carolina (the seat of the North Carolina action) than Upper Marlboro, Maryland (the seat of the Maryland action).[11] Moreover, the ACC representatives are based at conference headquarters in Greensboro, North Carolina. *See* North Carolina Complaint, ¶ 1. And, finally, the ACC filed the North Carolina Lawsuit in Greensboro, North Carolina nearly two months prior to the initiation of this duplicative action, and North Carolina law will govern almost all of the matters in dispute. In these circumstances, the principles of inconvenient forum and comity should lead to the dismissal of this North Carolina-based dispute in favor of the already-pending North Carolina Lawsuit involving the same parties and subject matter.

A. <u>This Action Should Be Dismissed Because North Carolina is a More Convenient Forum.</u>

Under Maryland law, an action may be dismissed or stayed "[i]f a court finds that in the interest of substantial justice an action should be heard in another forum." Md. Code Ann., Cts.

[10] Duke University, the University of North Carolina, North Carolina State University, and Wake Forest University.
[11] Clemson University, Florida State University, Georgia Tech, University of Miami, and Virginia Tech.

& Jud. Proc. § 6-104. While a plaintiff initially chooses the forum in which to file the action, that "choice . . . is 'not an absolute and uncontrolled privilege.'" *Cobrand v. Adventist Healthcare, Inc.*, 149 Md. App. 431, 440, 816 A.2d 117, 124 (2003) (internal citation omitted). Two basic factors inform whether there is a more convenient forum—convenience and the interests of justice. *See id.* at 438, 816 A.2d at 121; *Stidham v. Morris*, 161 Md. App. 562, 567, 870 A.2d 1285, 1289 (2005).

"Convenience" involves a review of the convenience of both the parties and any witnesses. *See Odenton Dev. Co. v. Lamy*, 320 Md. 33, 41, 575 A.2d 1235, 1238 (1990); *Simmons v. Urquhart*, 101 Md. App. 85, 105–06, 643 A.2d 487, 497 (1994), *rev'd on other grounds by Urquhart v. Simmons*, 339 Md. 1, 660 A.2d 412 (1995). "The 'interests of justice' factor requires a court to weigh both the private and public interests." *Stidham*, 161 Md. App. at 568, 870 A.2d at 1289. Private and public interests include such things as whether the actions at issue occurred in the jurisdiction, the ease of access to sources of proof, and the availability of compulsory process for attendance of unwilling witnesses, considerations of court congestion, the burdens of jury duty, local interest in the issues, and having issues decided by a court familiar with the governing State law. *See id.*; *Smith v. State Farm Mut. Auto. Ins. Co.*,169 Md. App. 286, 299, 900 A.2d 301, 309 (2006) (quoting *Stidham*); *Pittsburgh Corning Corp. v. James*, 353 Md. 657, 662, 728 A.2d 210, 212 (1999). Here, these factors weigh in favor of finding North Carolina to be the more convenient forum.

The convenience of the likely witnesses weighs heavily in favor of dismissing this action in favor of the North Carolina Lawsuit. Specifically, because the circumstances surrounding the amendment to Section IV-5 of the ACC Constitution are clearly the linchpin of both the North Carolina Lawsuit and this action, key witnesses are likely to be ACC representatives and the

Presidents of the Member Schools who debated and voted on the amendment at a meeting that took place in Chapel Hill, North Carolina. As described above, nearly all of these key witnesses are either located in North Carolina, or reside far closer to North Carolina than Maryland. Thus, North Carolina is a more convenient forum for a significant majority of the key witnesses in this case.[12] *See Payton-Henderson v. Evans*, 180 Md. App. 267, 290–91, 949 A.2d 654, 667 (2008) (noting that "scales . . . tilt heavily" towards transfer when one location more convenient for witnesses); *Smith*, 169 Md. App. at 301, 900 A.2d at 310 (noting that balance in favor of transfer where majority of witnesses located in jurisdiction where case to be transferred to).

The interests of justice also favor North Carolina as the more convenient forum. For example, the amendment of Section IV-5 was debated, discussed, analyzed, and voted upon in Chapel Hill, North Carolina during the September 11-12, 2012 meeting of the ACC's Council of Presidents. *See* North Carolina Complaint, ¶ 15; *see also Odenton*, 320 Md. at 37, 575 A.2d at 1238 (indicating scales tip in favor of transfer where "cause of action arose" in other jurisdiction). As a result, this is a dispute that at its core concerns the interpretation of the ACC Constitution and will be governed by the law of the jurisdiction where that contract was entered into and amended[13]—North Carolina—and should be resolved by courts located in that state. *See Pittsburgh Corning Corp.*, 353 Md. at 662, 728 A.2d at 212 (noting that factor in favor of transfer is having trial in a forum familiar with the governing State law). Finally, to the extent that resort to compulsory process becomes necessary to secure the attendance of unwilling

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[12] By way of contrast, only one Member School (UMD) is located in Maryland, and only one other is conclusively closer to Maryland than North Carolina (Boston College). The University of Virginia is roughly equidistant from North Carolina and Maryland.

[13] *See, e.g.*, *Konover Prop. Trust, Inc. v. WHE Assocs., Inc.*, 142 Md. App. 476, 490, 790 A.2d 720, 728 (2002) ("When determining which law controls the enforceability and effect of a contract, this Court generally applies the principle of *lex loci contractus*. Under this principle, the law of the jurisdiction where the contract was made controls its validity and construction . . . . For choice-of-law purposes, a contract is made where the last act necessary to make the contract binding occurs."); *see also* discussion, *supra*, at note 9 (law of North Carolina should apply to plaintiffs' claim for tortious interference).

witnesses at trial, only the witnesses from UMD could be compelled to provide trial testimony in this action. *See Stidham*, 161 Md. App. at 568, 870 A.2d at 1289 (identifying compulsory process as a private interest factor). Conversely, all of the key ACC employees as well as any President or employee of the four North Carolina-based Member Schools would be subject to compulsory attendance at trial in North Carolina. In these circumstances, the interests of justice weigh in favor of North Carolina as the more convenient forum.

B. This Action Should Be Dismissed In Favor of the First-Filed North Carolina Lawsuit as a Matter of Comity.

Separate and apart from the issue of inconvenient forum, it is also well-established in Maryland that "[a]s a matter of comity . . . , the court of one state may stay or dismiss a proceeding pending before it on the ground that a case involving the same subject matter and the same parties is pending in a court of another state." *Apenyo v. Apenyo*, 202 Md. App. 401, 410 32 A.3d 511, 516 (2011) (quoting 21 C.J.S. *Courts* § 308); *see also State v. 91st Street Joint Venture*, 330 Md. 620, 628, 625 A.2d 953, 956 (1993) ("It has long been the rule in this State that, once a court takes jurisdiction over a particular subject matter, another court of concurrent jurisdiction generally should abstain from interfering with the first proceeding.").

The determination of whether the North Carolina Lawsuit is owed deference in these circumstances is a discretionary decision that should be based generally on consideration of the following factors: avoiding conflicting or inconsistent judgments, the possibility that a judgment in the North Carolina Lawsuit will give rise to issues of claim or issue preclusion, the question of whether plaintiffs can obtain complete relief in the North Carolina Lawsuit, the progression of the North Carolina Lawsuit, avoiding increased costs, and prevention of harassment. *See Apenyo*, 202 Md. App. at 413, 32 A.2d at 518 (quoting 21 C.J.S. *Courts* § 309). Here, each of

these factors favors dismissal of this action in favor of the already-pending North Carolina Lawsuit involving the exact same parties and subject matter.

In the first instance, the instant action should be dismissed because the issues involved are likely to be resolved by the North Carolina Lawsuit. The courts of this state have observed that the principle of comity is designed, in part, to avoid situations in which "parallel proceedings in . . . two courts would likely result in inconsistent and conflicting decrees [being] passed with reference to the same subject matters." *See 91st State Street Joint Venture*, 330 Md. at 628, 625 A.2d at 957 ("[T]he only course of safety, therefore, is, when one court having the jurisdiction over the subject, has possession of the case, for all others, with merely co-ordinate powers, to abstain from any interference. Any other rule will unavoidably lead to perpetual collision, and be productive of the most calamitous results." (internal citations omitted)). This jurisdictional collision is precisely what will occur here if the instant action is not dismissed.

Indeed, there can be very little question that the first-filed North Carolina Lawsuit will operate as a bar to this action once it is reduced to judgment. In Maryland, claim preclusion (or res judicata) operates to bar a second lawsuit when "the parties to a second suit are the same or in privity with the parties to a first suit; the first and second suits present the same claim or cause of action; and there was a final judgment rendered on the merits in the first suit, by a court of competent jurisdiction." *Weatherly v. Great Coastal Express Co., Inc.*, 164 Md. App. 354, 368, 883 A.2d 924, 932–33 (2005). Here, claim preclusion will bar plaintiffs' declaratory judgment claim because it is effectively the same as the ACC's declaratory judgment claim in the North Carolina Lawsuit.

"As a general rule, courts will not entertain a declaratory judgment action if there is pending, at the time of the commencement of the action for declaratory relief, another action or

proceeding involving the same parties and in which the identical issues that are involved in the declaratory action may be adjudicated. . . . [A]bsent unusual and compelling circumstances, a declaratory judgment action is inappropriate where the same issue is pending in another proceeding." *Waicker v. Colbert*, 347 Md. 108, 113, 699 A.2d 426, 428 (1997) (internal citation and quotation marks omitted) (directing trial court to dismiss declaratory judgment action in view of other pending action involving the same issues). This rule applies where, as here, the other action is pending in another forum. *See Watson v Dorsey*, 265 Md. 509, 512 n.1, 290 A.2d 530, 532 n.1 (1972).

The plaintiffs' declaratory judgment claim should be dismissed because it is essentially the same as the declaratory judgment claim the ACC filed previously in the North Carolina Lawsuit. The parties in this action and the North Carolina Lawsuit are exactly the same—the ACC, UMD, and the Board of Regents. Moreover, both declaratory judgment claims deal with one issue—the enforceability of Section IV-5 dealing with withdrawal payments. In North Carolina, the claim takes the form of a request from the ACC for a declaration that Section IV-5 of the ACC Constitution is valid and enforceable, and that UMD is subject to the withdrawal payment. *See* North Carolina Compl., at Prayers 1–2. Here, the claim takes the form of a request from plaintiffs for a declaration that the withdrawal payment is invalid and unenforceable, that Section IV-5 of the ACC Constitution is invalid or, if valid, applies only to notices of withdrawal provided after July 1, 2013, that UMD is entitled to its distributions of conference revenues without offset, and that UMD should have rights as an ACC member. *See* Compl., ¶¶ 32–33. Therefore, the declarations that plaintiffs seek here are very similar to the

issues that will be resolved by the North Carolina Lawsuit. Moreover, plaintiffs have identified no compelling circumstances that would warrant avoiding this general rule.[14]

Nor do plaintiffs' claims for non-declaratory relief render this action meaningfully different from the North Carolina Lawsuit or obviate the danger that the earlier-filed lawsuit will resolve the issues in this action. Pursuant to the doctrine of issue preclusion (or collateral estoppel), a prior action between the parties, "whether on the same or a different claim" is "conclusive in a subsequent action" when "an issue of fact or law is actually litigated and determined by a valid and final judgment [] and the determination is essential to the judgment." *Weatherly*, 164 Md. App. at 369, 883 A.2d at 933 (internal citations omitted); *see also Rourke v. Amchem Prods., Inc.*, 384 Md. 329, 357–58, 863 A.2d 926, 943 (2004) (noting that issue preclusion applies when "in a second suit between the same parties, even if the cause of action is different, any determination of fact that was actually litigated and was essential to a valid and final judgment is conclusive"). Although plaintiffs' claims for antitrust violations, breach of contract, and tortious interference are not present in the North Carolina Lawsuit, the resolution of all three claims necessarily will involve legal and factual issues pertaining to the amendment of Section IV-5 that are identical to those that must also be resolved in North Carolina. For the same reason, plaintiffs will have the opportunity (and, perhaps, the obligation) to assert these claims in the North Carolina Lawsuit as compulsory counterclaims, thus affording them a full and complete opportunity to obtain the relief it seeks in this action. *See* N.C. R. Civ. Proc. 13(a).

[14] The Court should dismiss the declaratory judgment claim for the additional reason that plaintiffs have raised a breach of contract claim in this action that will resolve the issues raised in the declaratory judgment claim. *See Porcelain Enamel & Mfg. Co. v. Jeffrey Mfg. Co.*, 177 Md. 677, 680–81, 11 A.2d 451, 453 (1940). Plaintiffs' breach of contract claim raises the same issues as plaintiffs' declaratory judgment claim; namely, the enforceability of the ACC's amendment to Section IV-5, and the viability of the withdrawal payment and the ACC's offset of UMD's conference revenue distributions. Therefore, the court has discretion to dismiss the declaratory judgment claim. *See* Md. Code Ann., Cts. & Jud. Proc. § 3-409; *Polakoff v. Hampton*, 148 Md. App. 13, 31–32, 810 A.2d 1029, 1039–40 (2002).

Finally, plaintiffs cannot dispute that the North Carolina Lawsuit was filed months before this action. The prosecution of these two lawsuits on parallel tracks would result in increased costs for the parties, to say nothing of the increased cost to this Court and the Maryland taxpayers of devoting judicial resources to a dispute that is essentially duplicative of the North Carolina Lawsuit and easily can be resolved in that forum. There can be no question that the maintenance of these lawsuits in tandem would result in substantial harassment to the likely witnesses—each of whom would be potentially subject to providing deposition and trial testimony on the exact same subject matter in two separate forums. These comity factors therefore weigh in favor of dismissal.

Under any scenario, the likelihood is that this action will be resolved by the North Carolina Lawsuit, and plaintiffs will have an adequate opportunity in that forum to raise their claims. In addition, it is clear that judicial efficiency and economy would be promoted by permitting the first-filed North Carolina Lawsuit to proceed without interference from this duplicative action. Accordingly, because all of the comity factors counsel in favor of deference to the North Carolina Lawsuit, this action should be dismissed.

IV. THIS ACTION SHOULD ALTERNATIVELY BE STAYED PENDING RESOLUTION OF THE NORTH CAROLINA LAWSUIT.

The courts of this state "may stay proceedings before [them] pending the determination of another proceeding that may affect the issues raised." *See, e.g.*, *Lasater v. Guttman*, 194 Md. App. 431, 443, 5 A.3d 79, 86 (2010) (internal citation omitted). Entry of a stay also can be appropriate in circumstances involving lawsuits brought in an inconvenient forum or in situations requiring deference to the proceedings of another state. *See, e.g.*, Md. Code Ann., Cts. & Jud. Proc. § 6-104 ("If a court finds that in the interest of substantial justice an action should be heard in another forum, the court may stay or dismiss the action in whole or in part on any conditions it

considers just." (emphasis supplied)); *Apenyo*, 202 Md. App. at 410, 32 A.3d at 516 ("As a matter of comity, however, the court of one state may stay or dismiss a proceeding pending before it on the ground that a case involving the same subject matter and the same parties is pending in a court of another state or foreign country." (emphasis supplied) (internal citations omitted)); *see also* 7 Md. Law Encyclopedia *Courts* § 103 ("[I]t is usual for the court in which the later action is brought to stay proceedings under such circumstances until the earlier action is determined." (emphasis supplied)). Here, even if plaintiffs' claims are not dismissed on their merits for the reasons described in Sections I through III, *supra*, the instant action should be stayed pending resolution of the North Carolina Lawsuit so that this Court can determine which issues, if any, remain.

For the reasons described in Section III, *supra*, this action involves the same parties, witnesses, claims, and issues as the North Carolina Lawsuit. It would be inefficient and wasteful for these lawsuits to proceed on parallel tracks, and a stay should therefore enter so that this Court can better determine at a future time the extent to which the resolution of the North Carolina Lawsuit will moot these proceedings. *See Lasater*, 194 Md. App. at 444, 5 A.3d at 87 (holding that it was "well within the court's discretion" to stay tort action pending equitable distribution of marital property in divorce action between the same parties because "[t]here was certain to be overlap between the issues in the divorce case and the case at bar").

Moreover, to the extent that plaintiffs suggest that a stay is inappropriate because their antitrust claim renders this action different from the North Carolina Lawsuit, which the ACC does not concede, that contention would also weigh in favor of a stay. Discovery in antitrust litigation is notoriously expensive. *See, e.g.*, *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 558 (2007) ("proceeding to antitrust discovery can be expensive."). It makes little sense to require

the parties and third-party witnesses to bear the high burden and expense of antitrust discovery in this action prematurely. Accordingly, should this Court conclude that outright dismissal of plaintiffs' claims is not appropriate at this stage, it should exercise its discretion to alternatively stay this action pending resolution of the North Carolina Lawsuit.

CONCLUSION

WHEREFORE, for the foregoing reasons, the ACC respectfully requests that this Court grant its motion, and dismiss Counts I through IV of plaintiffs' Complaint with prejudice and without leave to amend or, in the alternative, stay this action pending resolution of the North Carolina Lawsuit.

April 5, 2013

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 5, 2013, a true and correct copy of the foregoing was served, via first class mail, on the following:

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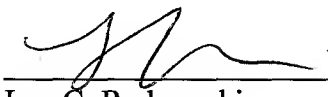

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